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ISSUER OPPOSITION AND SHAREHOLDER DISAGREEMENT: RULE 14A-8(M)

I. INTRODUCTION

Rule 14a-8 of the Securities Exchange Act of 1934 authorizes shareholders to submit proposals for inclusion in the corporation's proxy statement.¹ Typically, the company attaches a statement of opposition objecting to the proposal. In doing so, the Rule requires the company to provide the statement to the submitting shareholder at least thirty days prior to the filing of definitive proxy materials. Shareholders can request that management make changes and, in the case of statements considered misleading, notify the Securities and Exchange Commission (SEC)²

The history of the provision indicates that the SEC has not enforced the requirement. Companies do not always provide shareholders with a copy of the opposition statement. When they do, shareholders sometimes raise concerns over the contents with the SEC. The staff, however, has never brought an action against a company for inaccurate disclosure in the opposition statement. Instead, the no-action record suggests that, for the most part, the staff simply ignores concerns raised by shareholders.

This paper will examine Rule 14a-8(m). The first part will examine the administrative history of the provision. The paper will then consider the response by the SEC to claims by shareholders that opposition statements contained false or misleading information. Finally, the paper will analyze steps the SEC should take moving forward in regards to the Rule.

II. ADMINISTRATIVE HISTORY

In adopting Rule 14a-8, the SEC recognized that management had the right to oppose shareholder proposals included in the proxy statement.³ To the extent companies did so, shareholders were allowed to insert a statement of support of no more than 100 words, a length that would eventually be increased.⁴ Shareholders, however, had no advance access to

1. 17 C.F.R. § 240.14a-8(m) (2016).

2. *Id.* However, if you believe that the company's opposition to your proposal contains materially false or misleading statements that may violate our anti-fraud rule, § 240.14a-9, you should promptly send to the SEC staff and the company a letter explaining the reasons for your view, along with a copy of the company's statements opposing your proposal.

3. See SEC Release No. 3347, 1942 WL 34864 at *1 (Dec. 18, 1942) ("3. Stockholders making proposals for action which are opposed by management must be given not more than 100 words in the proxy in which to state their position, provided the security holder gives the management reasonable notice of his intention."). The SEC originally numbered the Rule X-14a-7.

4. Amendments To Rules On Shareholder Proposals, Securities Act Release No. 39093, 1997 WL 578696 at *42 (Sept. 18, 1997) ("The proposal, including any accompanying supporting statement, may not exceed 500 words.").

management's opposition statement, with a copy made available only after distribution of the proxy materials.⁵

In 1977, the SEC held hearings on corporate governance issues,⁶ including the proxy rules.⁷ The hearings included considerations of "limitations on the extent to which management may comment upon or make recommendations with respect to shareholder proposals[.]"⁸ Commentators expressed frustration with the lack of opportunity to review the opposition statement prior to receiving the proxy materials. The inability eliminated any chance to object to alleged misstatements before actual distribution.⁹ The approach left shareholders with the lack of a "workable remedy" other than likely resorting to judicial recourse.¹⁰

In the aftermath of the hearings, the SEC proposed amendments to Rule 14a-8 that would allow shareholders an opportunity to review opposition statements prior to distribution of the proxy materials and report false or misleading statements to the agency.¹¹ Doing so would help "to assure that shareholders vote on proposals without being misled by one party or the other."¹² In addition, the proposal would assist the SEC in "detecting inaccuracies."¹³ The SEC did not intend to create a debate over

5. Amendment of Proxy Rules, SEC Release No. 4775, 1952 WL 5254 at *8 (Dec. 11, 1952) ("Such statement and request shall be furnished to the management at the same time that the proposal is furnished to it. Neither the management nor the issuer shall be responsible for such statement.") The SEC originally numbered the Rule X-14A-8.

6. SEC Release No. 9914, 1977 WL 173489 at *1 (Aug. 29, 1977) ("[T]he Commission announced that it would hold public hearings concerning shareholder communications, shareholders participation in the corporate electoral process and corporate governance.").

7. *Id.* ("Hearings will commence on September 29, 1977 in Washington, D.C., on October 11, 1977 in Los Angeles, California, on October 18, 1977 in New York, New York and on November 1, 1977 in Chicago, Illinois.")

8. *Id.* at *1, *3 ("for the purpose of giving the Commission the benefit of the views of interested members of the public with respect to the subjects of shareholder communications, shareholder participation in the corporate electoral process and, more generally, corporate governance, in order to assist the Commission in a broad re-examination of Regulation 14").

9. Shareholder Communications, Shareholder Participation In the Corporate Electoral Process and Corporate Governance Generally, SEC Release No. 14970, 1978 WL 196325 at *12 (July 18, 1978) ("[A] number of witnesses opined that under the present system, which does not afford a proponent an opportunity to review management's statement in opposition until he receives the proxy materials in the mail, a proponent does not have a practical means of curing any misstatements[.]").

10. Shareholder Communications, Shareholder Participation In the Corporate Electoral Process and Corporate Governance Generally, SEC Release No. 15384, 1978 WL 195744 at *15 (Dec. 6, 1978) ("[E]ven if judicial review is available it is questionable in some instances whether it can provide a workable remedy. The deliberate pace of a court action may not be well suited ... appropriate relief may not be available before the meeting.").

11. *Supra* note 10, at *12, ("Proposed rule 14a-8(e) would, by providing shareholder-proponents with a similar opportunity to object to false or misleading material in management's opposing statement before the proxy statement is mailed to shareholders, help to assure that shareholders vote on proposals without being misled by one party or the other.")

12. *Id.* at *13 ("Commission recognizes that a shareholder-proponent may be in the best position to examine the opposing statement because he ordinarily would have sufficient knowledge of the facts and circumstances surrounding the subject matter of the proposal to detect possible misstatements or omissions.").

13. *Id.* ("Additionally, in view of the large numbers of proxy statements filed with the Commission each year, the Commission's role in detecting inaccuracies in the opposing statement must necessarily be somewhat limited.").

the merits of a shareholder proposal, but merely sought to provide an avenue for receipt of the proponent's views about what might be false or misleading.¹⁴ The SEC reasoned shareholders were in the best position to judge the accuracy of opposition statements.

The final rule required management to provide statements of opposition no later than ten calendar days prior to the filing of preliminary proxy materials.¹⁵ The time period was shortened to five days after receipt of a revised proposal.¹⁶ Shareholders had the right to submit a letter to the SEC setting out any false or misleading statements, with a copy provided to the company.¹⁷ The Commission agreed to closely monitor the effect of the rule, implemented the requirement on an "experimental basis", and promised to reevaluate the Rule sometime in the future.¹⁸

Shareholders apparently made modest use of the constraint. In 1982, Sisters of St. Joseph (Sisters) objected to the opposition statement of Consolidated Edison Company of New York (CEC), regarding a proposal affecting low-income families and electricity rates.¹⁹ The Sisters argued that CEC provided materially false and misleading information and violated the relevant timeline with respect to shareholder review of the opposition statement.²⁰ Specifically, Sisters noted that CEC had not provided the opposition statement in time for review.

The SEC confirmed that the opposition statement appeared to contravene the anti-fraud provision in the proxy rules.²¹ However, due to "limited enforcement resources," the staff declined to recommend an action against the company.²² Instead, the staff agreed that the modest showing

14. *Id.* ("In this regard, it is important to note that proposed rule 14a-8(e) is intended to elicit a proponent's views only to the extent that these views relate to misstatements or omissions of a factual nature; the rule is not intended to provide a forum for further debate...").

15. *Supra* note 11, at *19 ("If the management intends to include in the proxy statement a statement in opposition to a proposal received from a proponent, it shall not later than ten calendar days prior to the date the preliminary copies of the proxy statement and form of proxy are filed pursuant to rule 14a-6(a)[.].").

16. *Id.* ("[I]n the event that the proposal must be revised to be includable, not later than five calendar days after [sic] receipt by the issuer of the revised proposal, promptly forward to the proponent a copy of the statement in opposition to the proposal.").

17. *Id.* ("In the event the proponent believes that the statement in opposition contains materially false or misleading statements ... the proponent should promptly provide the staff with a letter setting forth the reasons for this view and at the same time promptly provide management with a copy of such letter.").

18. *Id.* at *16 (The adoption of the proposal was opposed by some because they "believed it would result in delay and is unnecessary in light of the lack of demonstrated abuses in this area and the legal remedies which are already available to shareholder-proponents.").

19. Consolidated Edison Co. of New York, Inc., SEC No-Action Letter, 1982 WL 29313 (June 2, 1982).

20. *Id.* at *1 (citing "certain violations on the Proxy Rules (Regulation 14A).").

21. *Id.* at *1 ("Based on facts presented in your letter, we would concur in your view that the Company failed to comply with Rule 14a-8(e) and that the thrust of its statement in opposition to the proposal is contrary to Rule 14a-9.").

22. *Id.*

of support by shareholders would not be a basis for exclusion of the proposal the following year.²³ CEC disagreed with the determination and unsuccessfully sought reconsideration.²⁴ The Sisters submitted but withdrew the same proposal the following year.²⁵

Similarly, in Control Data Corporation (CDC), the proposal addressed the treatment of former employees in South Korea.²⁶ The shareholder asserted that the prior year's opposition statement contained false or misleading statements and was part of a "carefully crafted effort to discredit" the proponents and their organizations.²⁷ The staff agreed that "portions of [the prior year's] statement in opposition to the proposal may have been contrary to Rule 14a-9."²⁸ As a result, the staff concurred that "it would be inappropriate for the Company to rely on the 1984 vote for excluding the proposal"²⁹

Finally, in at least one instance, the staff received but failed to respond to allegations of false material in an opposition statement. The Central Pension Fund of the International Union of Operating Engineers and Participating Employees (Central) alleged that the opposition statement submitted by Phelps Dodge Corporation (PDC) contained false information.³⁰ Central requested the SEC review the statements for language contrary to the Rules.³¹ Apparently the Company never received a response.³²

23. *Id.* at *1 ("Accordingly, we hereby inform the Company that in the Division's view the 1982 vote on this proposal will not apply for omitting the same or substantially the same proposal in future years under subparagraph (c)(12) of Rule 14a-8.").

24. Consolidated Edison Co. of New York, Inc., SEC No-Action Letter, 1982 WL 29822 (Nov. 8, 1982).

25. Consolidated Edison Co. of New York, Inc., SEC No-Action Letter, 1983 WL 30945 (Mar. 11, 1983).

26. Control Data Corp., SEC No-Action Letter, 1985 WL 53921 at *3 (Mar. 4, 1985) ("I am deeply concerned about the situation of your former employees in Korea. For this reason I am filing the attached shareholder resolution.").

27. *Id.* at *11 ("As these four examples demonstrate, CDC's Statement in Opposition was a carefully crafted effort to discredit the 1984 proponents and other organizations which might support their resolution. By accusing these groups of spreading false and misleading information, CDC has itself violated Rule 14a-9.").

28. *Id.* at *1.

29. *Id.* ("Accordingly, we do not believe that the management may rely upon Rule 14a-8(c)(12) as a basis for omitting the proposal.").

30. Phelps Dodge Corp., SEC No-Action Letter, 1985 WL 54058 (Mar. 26, 1985).

31. *Id.* at *4 ("Pursuant to Rule 14a-8(e), proponent believes that the Company's statement in opposition contains a misleading statement within the meaning of Rule 14a-9.").

32. *Id.* at *1 ("There appears to be some basis for your opinion that the proposal may be excluded under Rule 14a-8(c)(7), since it appears to deal with a matter relating to the Company's ordinary business operations[.]"). In other instances, the staff apparently failed to respond. *See* Am. Express Co., SEC No-Action Letter, 1995 WL 34061 (Jan. 30, 1995); *See also* N. Bancshares Inc., SEC No-Action Letter, 1998 WL 40249 (Jan. 29, 1998).

The staff, therefore, either ignored shareholder allegations or suggested that the only penalty would be the inapplicability of the “resubmission” exclusion.³³ In cases where companies sought omission of resubmitted proposals because of inadequate support the prior year, shareholders sometimes argued against the exclusion by asserting that the prior year’s opposition statement contained false disclosure. The approach, however, rarely succeeded.

A shareholder resubmitted a proposal seeking to require Union Carbide to provide “immediate humanitarian relief to the Bhopal victims.”³⁴ The company sought exclusion arguing that the proposal had received inadequate support the prior year.³⁵ The shareholder asserted that the opposition statement contained false and misleading information.³⁶ The SEC ignored the arguments of the shareholder and allowed the exclusion of the proposal under the resubmission section.³⁷

Similarly, in a letter to IBM, shareholders sought to avoid exclusion because of an allegedly false statement of opposition. In this case, however, the staff expressly addressed the allegations:

“We are formally responding to your arguments that the Company’s statement in opposition contained false and misleading statements notwithstanding our policy summarized above because you contend that use of such statements precludes the Company from relying on rule 14a-8(c)(12). The staff has determined, after again carefully reviewing all relevant information, that the subject portions of the Company’s statement in opposition contained in its 1988 proxy materials did not contravene rule 14a-9.”³⁸

The “experiment” in providing shareholders with early access to the opposition statement lasted until 1987 when the SEC again amended the provision.³⁹ The modified rule required companies to send opposition statements to shareholders not later than thirty days prior to the filing of

33. § 240.14a-8(i)(12) (A proposal may be excluded if it received less than 3% of the vote after being proposed once within 5 years, less than 6% after being proposed twice, or less than 10% after being proposed three times.).

34. Union Carbide Corp., SEC No-Action Letter, 1991 WL 176577 at *1 (Jan. 30, 1991).

35. *Id.* (“The Corporation believes that the 1991 proposal may be omitted under Rule 14a-8(c)(12) because it deals with substantially the same subject matter as proposals submitted by the same two Proponents for the 1989 annual meeting of stockholders”).

36. *Id.* (“the vote on the prior submission was not a representative vote because the issuer’s Statement in Opposition was misleading.”).

37. Int’l Bus. Machs. Corp., SEC No-Action Letter, 1989 WL 246638 at *1 (Dec. 27, 1989) (“There appears to be some basis for your opinion that the proposal may be omitted from the Company’s proxy materials under rule 14a-8(c)(12)[.]”).

38. *Id.* at *3 (The actual letter could not be discovered. This is a quote from an SEC letter, quoted in the company’s letter.).

39. Proxy Rules; Amendments To Eliminate Filing Requirements for Certain Preliminary Proxy Material; Amendments With Regard to Rule 14a-8, Shareholder Proposals, SEC Release No. 25217, 1987 WL 847542 at *1 (Dec. 21, 1987) (“The Commission today announced the adoption of amendments to the proxy rules to eliminate the filing of preliminary proxy and information statements under certain circumstances.”).

definitive proxy materials.⁴⁰ Proponents notifying the SEC of false disclosure were required to submit a copy of the opposition statement with the claim.⁴¹ Inclusion would prevent delays in review.

In 1997, the Commission proposed to rewrite Rule 14a-8 using a question and answer format.⁴² The SEC requested comment on whether to eliminate 14a-8(e) altogether.⁴³ The release noted shareholders rarely used the provision and, when they did, "staff review rarely result[ed] in modifications"⁴⁴ Alternatively, the SEC proposed revisions of the requirement, including language that encouraged parties to work out their differences.

Commenters objected to the removal of the subsection because, although rarely utilized in practice, it deterred companies from including materially false or misleading information in the opposition statements.⁴⁵ At least one commentator acknowledged a lack of awareness that the requirement even existed.⁴⁶ The final amendments adopted the question and answer format and renumbered the subsections but otherwise made no substantive changes in the opposition statement requirement.

III. STAFF INTERPRETATION OF NO-ACTION LETTERS

Since these amendments, few no-action letters have addressed claims of misleading disclosure in the opposition statement.⁴⁷ The staff, however,

40. *Id.* at *6 ("Paragraph (e) of Rule 14a-8 is amended to require that, not later than 30 calendar days prior to the filing of definitive proxy material with the Commission, the registrant forward to a shareholder proponent a copy of any statement in opposition to the proponent's resolution that the registrant intends to include in the proxy statement.").

41. *Id.* at *6 ("In addition, the Commission is amending the last paragraph of Rule 14a-8(e) to require that a proponent who believes that the registrant's statement in opposition is false and misleading . . . provide a copy of the statement in opposition to the Commission").

42. *Supra* note 5, at *1, ("We propose to recast rule 14a-8 into a Question & Answer format that both shareholders and companies should find easier to follow, and to modify the rule to address concerns raised by both shareholders and companies. We also propose revisions to related rules.").

43. *Id.* at *24 ("Accordingly, we propose to eliminate the mechanism provided by current rule 14a-8(e). We request your comments on this proposal.").

44. *Id.* ("In our experience, only a handful of shareholders make use of the mechanism each year, and the staff review rarely results in modifications to the company's statement.").

45. Amendments To Rules On Shareholder Proposals, SEC Release No. 23200, 1998 WL 254809 at *13 (May 21, 1998) ("A number of commenters from the shareholder community opposed elimination of these procedures because they believed that the potential for proponent objections deters companies from making materially false or misleading statements, and encourages negotiation between the company and proponent.").

46. Comment Letter from Arthur R. Mixon, Stockholder Proposals (Oct. 7, 1997), <https://www.sec.gov/rules/proposed/s72597/mixon1.txt>.

47. Liberty All-Star Growth Fund, Inc., SEC No-Action Letter, 2012 WL 2150789 at *1 (May 10, 2012) ("We note that the Fund will have an opportunity to include in its proxy statement arguments reflecting its own point of view on the Proposal."). Companies have also recognized their own right to do as much. *See also*, AT&T Wireless Services, Inc., SEC No-Action Letter, 2003 WL 262467 at *7 (Jan. 24, 2003) (Management does not "claim" the right to advise against a vote in favor of shareholder sponsored proposals; it has the right, a right conferred by Proxy Rule 14a-8(m).). Shareholder proponents, have also used the rule to instruct the company to use (m). Avaya Inc., SEC No-Action Letter, 2001 WL 1549132 at *27 (Dec. 04, 2001) ("Rather, the right avenue for Avaya if it disagrees with the Proposal is to include a statement in opposition, as contemplated by Rule 14a-8(m)."). In some instances, companies have tried to impose unilateral restrictions on the use of the opposition

reiterated the right of shareholders to bring false statements to the attention of the SEC. In Legal Bulletin 14, the Staff stated:

If a shareholder believes that a company's statement in opposition is materially false or misleading, the shareholder may promptly send a letter to us and the company explaining the reasons for his or her view, as well as a copy of the proposal and statement in opposition. Just as a company has the burden of demonstrating that it is entitled to exclude a proposal, a shareholder should, to the extent possible, provide us with specific factual information that demonstrates the inaccuracy of the company's statement in opposition.⁴⁸

Companies and shareholders were encouraged “to work out” differences before contacting the staff.⁴⁹

In some cases the approach worked as desired. Shareholders raised objections and companies altered disclosure. In a 2000 no-action letter, College Retirement Equities Fund (CREF) opposed a proposal that would require the sale of shares in certain companies. The record contained a reference to changes made in the opposition statement by the company after learning of the shareholder's objections.⁵⁰

More commonly, however, the no action record suggested a low success rate for shareholders when raising concerns about the accuracy of an opposition statement. Likewise, the record reflects a lack of response on the part of the staff to claims by shareholders of violations of the rule or the existence of inaccurate disclosure. For the most part, the staff simply ignored the concerns.

In some instances, shareholders alleged that they did not receive the statement or did not receive the statement in a timely fashion.⁵¹ In Nabors Industries, for example, the shareholder charged that:

The Funds submitted the Proposal to Nabors on November 29, 2011. Since that date, the Funds have received no draft of Nabors' Statement,

statement by shareholders. *See, e.g.*, State St. Corp., SEC No-Action Letter, 2005 WL 544212 at *2 (Mar. 1, 2005) (“I deem myself to be entirely at liberty to share the contents of the registrant's Rule 14a-8(m) statement with other shareholders. Indeed, I view it as a breach of the fiduciary duties of loyalty and care for the Directors to conceal their true reasons for opposing my shareholder proposal from the body of shareholders.”).

48. SEC Staff Accounting Bulletin No. 14 (July 13, 2001).

49. Nabors Indus., Inc., SEC No-Action Letter, 2013 WL 1682464 at *1 (Apr. 15, 2013) (“We encourage shareholders and companies to work out these differences before contacting us.”).

50. College Ret. Equities Fund, SEC No-Action Letter, 2000 WL 1280910 at *8 (“In a letter dated 27 September 1999, Abby Ingber sent me a response (cc:ed to Kevin M. Kirchoff, SEC) in which CREF agreed to a [sic] revise the statement in question.”).

51. *Supra* note 49, at *5; *See also* Raytheon Co., SEC No-Action Letter, 2008 WL 887164 at *5 (Mar. 28, 2005) (“following the delivery of the broker letter to the company in accordance with Raytheon Company (February 13, 2008), the company failed to forward an opposition statement.”); Plymouth Rubber Co., SEC No-Action Letter, 1998 WL 60796 (Feb. 4, 1998).

and have been given no opportunity to comment. Rather. [sic] I am informed, we discovered from our own search that Nabors filed its preliminary proxy materials with the Division on April 9, 2012, and then filed its definitive proxy materials today. When we reviewed those proxy materials, we found that Nabors' Statement in Opposition contained untrue comments, which due to Nabors' misconduct, the Funds never got a chance to correct. I have reviewed the relevant facts and law, and in my opinion, under the facts and law, action by the Division to require Nabors to correct its proxy materials before its June 5, 2012 annual meeting is appropriate and necessary, to redress Nabors' violations of law.⁵²

The Company acknowledged the violation but argued that shareholders were not "harmed" by the "error."⁵³ The shareholder asked that staff consider a "formal referral for enforcement action" or the issuance of "a public letter of warning to the Company"⁵⁴ The record contains no response from the staff.

Similarly, the staff did not respond to allegations made by shareholders of misleading disclosure in the opposition statement. In Drexler Technology Corporation (Drexler), the shareholder proponent alleged that the opposition statement contained false or misleading statements. Drexler denied the allegations and sent the material, including a copy of the opposition statement, directly to the SEC.⁵⁵ Again the staff did not address the issue.

In Nabors Industries Inc., the New York City Pension Funds (the Funds), the shareholder contested the accuracy of the opposition statement.⁵⁶ The shareholder apparently tried unsuccessfully to negotiate changes in the language. As the shareholder explained:

[T]he NYC Funds first wrote to Nabors detailing the Funds' concerns about misstatements in Nabors' Statement in Opposition, and suggest-

52. *Supra* note 49 at *5.

53. *Supra* note 49, at *9 ("The simple answer is that we did indeed neglect to provide the Shareholder Proponent the 30 days called for by Rule 14a-8.").

54. *Id.* at *11.

55. *Id.* at *2 ("The Proponent has asserted that the Company's statement opposing his proposal is false and misleading. . . . The Company denies that this is the case. In order to avoid any miscommunication, we enclose for your review a copy of the Company's opposition statement and its correspondence to the Proponent...").

56. *Supra* note 49 at *1 ("This year, the Company did not repeat that same violation of Rule 14a-8, but it is insisting, in violation of Rule 14a-8, on mailing uncorrected proxy materials with untrue allegations. The Funds request that the Division take appropriate action in advance of Nabors' 2013 annual meeting of shareholders."); *See also*, N. Bancshares, Inc., 1998 WL 40249 at *10 (Jan. 29, 1998) ("The writer has no record of receiving, not later than 30 calendar days prior to the filing, a copy of the statement in opposition to the proposal, as required by Rule 14a-8(e).").

ing specific, narrow changes that the Company could make to its Statement to resolve those concerns completely. The Company, in response, rejected making any changes whatsoever to its Statement.⁵⁷

Noting that the “Staff may take action to enforce Rule 14-8 if a company and a proponent cannot resolve any issues about the opposing statement” the shareholder specifically sought resolution by the Division. The Staff apparently never responded to the letter.⁵⁸

In some instances, proponents have noted the staff’s willingness to address concerns over accuracy raised by companies but not by shareholders. In *Mattel*, the company sought to exclude portions a shareholder’s supporting statement for being false or misleading.⁵⁹ In defending the statement, the proponent pointed out the disparity in treatment: “Neither the company nor its proxy provided one example of any company being required to change or omit text from a management opposition statement to a shareholder proposal and together they have experience with hundreds of management opposition statements.”⁶⁰

IV. ANALYSIS

The no-action record suggests that the staff does little to enforce the obligation of issuers to provide opposition statements or to ensure their accuracy. Evidence suggests that companies at least sometimes violate Rule 14a-8(m) by failing to provide copies of the opposition statement or failing to do so in a timely fashion. Likewise, the record suggests that the staff has not responded to a shareholder’s allegations of false disclosure in the opposition statement by requiring changes, bringing an enforcement action, or issuing a letter of admonition. In contrast, the staff regularly requires changes in supporting statements submitted by shareholders.⁶¹

57. *Supra* note 49, at *2, 4 (“The Office of Chief Counsel did not, in fact, reject the observations in the Company’s statement in opposition; rather, they [sic] determined that the statements contained in the proposal do not meet the high threshold for a “materially false or misleading” statement ... It does not preclude the Board from stating its opinions in response to the proposal.”).

58. Several occasions exist where shareholders have requested the SEC review opposition statements but their truthfulness is never reviewed because the proposal is excluded under one of the other rules. *See, e.g.*, Drexler Tech. Corp., SEC No-Action Letter, 2001 WL 959327 at *1–5 (Aug. 23, 2001).

59. Mattel Inc., SEC No-Action Letter, 2013 WL 6701960 at *1 (Jan. 6, 2014) (“We are unable to conclude that you have demonstrated objectively that the proposal or the portions of the supporting statement you reference are materially false or misleading.”).

60. *Id.* at *3; *See also* Am. Home Prods. Corp., SEC No-Action Letter, 2002 WL 377549 at *5 (Feb. 27, 2002) (The record contains evidence of unsuccessful efforts to work out concerns over the accuracy of the opposition statement. “There has been no company response to the request to make the following changes to prevent false and/or misleading text [sic] in the company rule 14a-8 opposing statement. The following changes are needed in the company opposing text ... This is to request that the company be contacted to make the above changes.” The letters in the no action file include no indication that Wyeth made changes as a result of the shareholder concerns.)

61. *See, e.g.*, Watts Indus., Inc., SEC No-Action Letter, 1998 WL 388487 at *1 (July 10, 1998); *See also* The Boeing Co., SEC No-Action Letter, 2003 WL 942871 at *1 (Feb. 26, 2003); *See also* Caterpillar Inc., SEC No-Action Letter, 2003 WL 40628 at *1 (Jan. 3, 2003).

This lack of enforcement carries costs. The approach gives the appearance that the staff does not enforce Rule 14a-8 in an evenhanded manner. Moreover, companies have no incentive to “work out their differences” because they know the staff will take no action if they fail.⁶²

The staff should take steps to enforce the requirement. Doing so would entail an examination of shareholder claims regarding the accuracy of the opposition statements. Merely acknowledging and reviewing letters submitted by shareholders would send a signal of seriousness by the SEC. To the extent, however, that the staff in fact uncovered violations of the rule or misleading disclosure, additional steps should be taken, including, where appropriate, a recommendation to the Division of Enforcement. Short of that, the staff could insist on changes to the disclosure, something that could delay the distribution of the proxy materials. Even the modest sanction associated with the inconvenience of a delayed distribution would likely encourage issuers to attempt to “work out their differences” with shareholders in a more concerted manner.

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62. See, e.g., *Supra* note 48, at *1.

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